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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRONE TURNER,

Defendant and Appellant.

B268088

(Los Angeles County  
Super. Ct. No. MA063686)

APPEAL from a judgment of the Superior Court of Los Angeles County. Christopher Estes, Judge. Affirmed in part and remanded in part with direction.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Tyrone Turner, a prison inmate, battered two prison guards. He was sentenced to ten years in prison, and ordered to pay a \$3,000 restitution fine. On appeal, he challenges the restitution fine and certain clerical errors in the abstract of judgment. We modify the abstract and remand for reconsideration of the restitution fine.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On October 8, 2012, defendant was serving a prison sentence. He did not comply with guards' orders to return to his cell. Without provocation, he approached Officer Travis Alatorre and repeatedly punched him in the face. When Officer Dinah Gant came to Officer Alatorre's assistance, defendant punched Officer Gant repeatedly, knocking her to the ground. Defendant did not comply with further orders to get to the ground, and was eventually subdued. At trial, defendant testified that he had acted in self-defense.

After a jury trial, defendant was convicted of two counts of battery by a prisoner on a non-confined person (Pen. Code, § 4501.5) and two counts of resisting an executive officer (§ 69).<sup>1</sup> Great bodily injury allegations, which would have rendered the offenses serious felonies, were found to be not true. Defendant admitted suffering two prior "strikes" within the meaning of the meaning of the Three Strikes law. (§ 1170.12.)

Defendant was sentenced to ten years in prison, calculated as the high term on one battery count (4 years), doubled for the strikes; plus a consecutive one-third the middle term on the

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

second battery count (1 year), also doubled.<sup>2</sup> Sentences on the resisting counts were stayed under section 654.

The court imposed no victim restitution. However, the court imposed a \$3,000 restitution fine and a \$3,000 concomitant parole revocation fine. This was done without objection. The court then explained defendant's appellate rights and asked defendant if he understood. Defendant, who was represented by counsel, told the court that he did not understand why restitution was imposed, because the probation report had indicated no victim losses and said nothing about his ability to pay. Defendant requested a hearing on his ability to pay. The court explained that there was no restitution order. Instead, the court stated, "You were ordered to pay a restitution – a mandatory restitution fine, and I ordered the mandatory minimum, based on \$300 per year." Defendant replied, "But I'm indigent, sir." The court "noted" defendant's position and proceeded to explain defendant's appellate rights.

Defendant filed a timely notice of appeal. On appeal, he argues that the trial court erred in imposing a \$3,000 fine as the "mandatory minimum," because the mandatory minimum was, in fact, \$300. The prosecution argues that this contention was forfeited by defendant's failure to raise it at sentencing, and that the fine imposed was within the court's discretion, but simultaneously notes that the mandatory minimum restitution fine for crimes committed in 2012 was actually \$240. (§ 1202.4, subd. (b)(1).) Defendant argues that, if his trial counsel forfeited

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<sup>2</sup> Although defendant had suffered two prior strikes, the court treated defendant as a second-striker since his current offenses were not serious or violent felonies.

the argument by failing to raise it, counsel rendered ineffective assistance.

## DISCUSSION

### 1. *Remand is Necessary for Reconsideration of the Restitution Fine*

When a defendant is convicted of a crime, the imposition of a restitution fine is mandatory, unless the court finds compelling and extraordinary reasons for not doing so. (§ 1202.4, subd. (b).) The fine “shall be set at the discretion of the court and commensurate with the seriousness of the offense.” (§ 1202.4, subd. (b)(1).) In 2012, the minimum fine was \$240. The minimum was increased to \$300 by the time of defendant’s sentencing. (§ 1202.4, subd. (b)(1).) The prohibition against ex post facto laws applies to restitution fines; the minimum at issue when the crime is committed, not when the defendant is sentenced, is what governs. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1188-1189.) The maximum restitution fine is \$10,000. (§ 1202.4, subd. (b)(1).) Within the range authorized by statute, the court has wide discretion in determining the amount. (*People v. Urbano* (2005) 128 Cal.App.4th 396, 406.)

The court “may,” but is not required to, determine the amount of the fine as the minimum fine multiplied by the years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted. (§ 1202.4, subd. (b)(2).)

A defendant’s inability to pay does not constitute a compelling and extraordinary reason not to impose a restitution fine. It may be considered “only in increasing the amount of the restitution fine in excess of the minimum fine . . . .” (§ 1202.4,

subd. (c).) There is no necessity to consider the defendant's ability to pay when the statutory minimum fine is imposed. (*In re Enrique Z.* (1994) 30 Cal.App.4th 464, 468-469.) "A defendant shall bear the burden of demonstrating his or her inability to pay." (§ 1202.4, subd. (d).)

In this case, the court imposed a \$3,000 fine. While this number was between the statutory minimum of \$240 and the maximum of \$10,000, and likely within the court's discretion, it is not at all clear that the court exercised its discretion in setting the amount. The court referred to the \$3,000 fine as "the mandatory minimum, based on \$300 per year." This statement was erroneous for two reasons: it assumed the statutory minimum was \$300, rather than \$240; and it implied that the minimum-multiplied-by-years-of-sentence calculation of subdivision (b)(2) was mandatory, rather than optional. Indeed, the court declined to allow defendant to establish his inability to pay, in an apparent belief that the court was imposing the mandatory minimum, rendering defendant's inability to pay irrelevant. These errors require a new restitution fine hearing.

To the extent the prosecution argues the contention was forfeited by a failure to object and defendant argues ineffective assistance of counsel, we exercise our discretion to consider the issue on the merits, mooted both arguments. (*People v. Urbano*, *supra*, 128 Cal.App.4th at p. 404.) We therefore reverse the restitution fine and remand for the court to exercise its discretion as set forth in the statute.

2. *Clerical Errors in the Abstract Must Be Modified*

On appeal, defendant identifies two errors in the abstract of judgment. First, the abstract erroneously describes count one as "Assault By Prisoner," rather than "Battery By Prisoner."

Second, the abstract mistakenly indicates that all four offenses are serious felonies. The prosecution concedes the errors and agrees they should be corrected. We therefore order the abstract modified.

### **DISPOSITION**

The superior court is directed to modify the abstract of judgment to reflect that: (1) count 1 was “Battery By Prisoner,” rather than “Assault By Prisoner; and (2) none of the four offenses of which defendant was convicted were serious felonies. The matter is remanded for the trial court to reconsider the restitution fine (and parole revocation fine) consistent with this opinion. In all other respects, the judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.